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Office Supreme Court, U. S.

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JAMES O. HANER

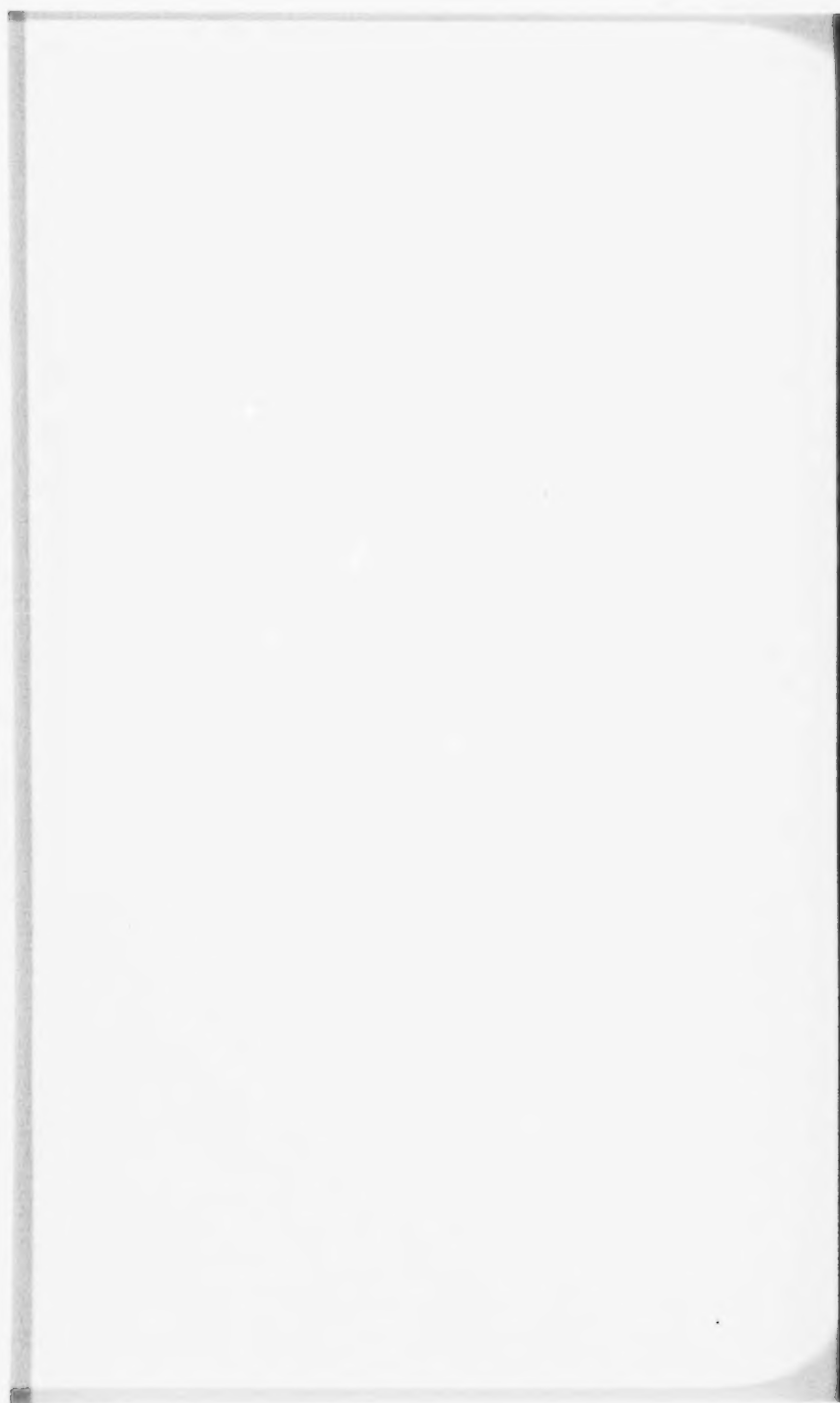
IN RE: JAMES O. HANER, PETITIONER.

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# Supreme Court of the United States.

October Term, 1915.

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JENNIE A. WILLINK, Executrix of HENRY F. WILLINK, deceased, Appellant, v. THE UNITED STATES.	} No. 180.
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*Appeal from the Court of Claims.*

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## BRIEF FOR APPELLANT.

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### I. Statement of the Case.

#### *Proceedings and Judgment.*

The petition in this case was originally filed in the Court of Claims by Henry F. Willink August 3, 1897 (record, pp. 1-3), and an amended petition December 23, 1898 (pp. 3-6). He therein claimed compensation as upon an implied contract for the value of certain land appropriated by the United States in the course of improvement of the harbor of Savannah, Georgia.

The case was originally heard by the Court of Claims and decided in an opinion by Chief Justice Nott delivered May 25, 1903 (record, pp. 15-17; reported 38 C. Cls. 693). A judgment was then rendered for the use and occupation of a portion of the land, amounting to \$2,000. This was, however, set aside on motion for new trial.

Subsequently the original claimant, Henry F. Willink, died and his executrix was on motion substituted (record, p. 7).

The case was on subsequent hearing decided adversely to the claimant and the petition dismissed April 27, 1914 (record, top p. 18). The opinion of Chief Justice Nott of 1903 was reiterated as the opinion of the court.

From the judgment of dismissal an appeal was taken (record, p. 18) by the claimant.

### ***The Facts Found.***

The facts as found by the Court of Claims are in brief as follows (Findings, record, pp. 7-14):

Henry F. Willink was long prior to the acts complained of the owner and in possession of a certain tract of land on Hutchinson's Island, opposite the city of Savannah, Georgia, having an aggregate frontage on the Savannah River of 625 feet, more or less, extending back from the river for a distance varying from 375 to 450 feet. He had for many years occupied this tract of land in the business of building and repairing vessels and had made there a number of improvements. There was a marine railway, consisting of a tract about 475 feet long, boilers and machinery fitted for the hauling of vessels upon this railway and holding them there for repair and lowering them into the water, a canal on the eastern side of the property, extending its entire depth, used for keeping timber, and several houses, wharves and a boat house. These facilities permitted the hauling out and repair of vessels up to 150 tons (Finding II, pp. 8, 9).

A map forming a part of the findings (opposite p. 8 of the record) illustrates the situation of the property.

For many years prior to 1889 the United States had been engaged in making improvements in the Savannah

River and harbor, these including that part of the river opposite the city of Savannah on which the claimant's land fronted. A long series of enactments, embracing, with but few exceptions, legislation of every year from 1872 to 1895, is set forth in Finding III (record, pp. 9, 10).

Prior to the appropriation made by the act of September 19, 1890, 26 Stat. L. 431, for "continuing improvement on extended project, \$350,000," the plan of improvement had been carried on under two projects, known as the projects of 1873 and 1882. In 1887 a project with estimates of cost was submitted to Congress, one of the principal features of which was "to enlarge the river at the city to a width of 600 feet by cutting off a portion of Hutchinson's Island," etc. (Finding IV, near top p. 11).

An official report of Brevet Major-General Q. A. Gillmore, Colonel of Engineers, dated October 12, 1887, correctly states the conditions existing on that date as follows (record, middle p. 11):

"The work of widening the waterway opposite the city to 600 feet, commenced under the previous projects, has been only partially accomplished, and should now be completed by the cutting away of a strip of land on the Hutchinson's Island side. A frontage of about 2,300 feet, averaging 62½ feet in width, should be removed. All but 500 feet of the front contains wharves, the majority in a more or less dilapidated condition. The land is held by sundry parties, is occupied by improvements, such as sawmills, log ponds, a shipyard and marine railway, and machine shops.

"It is understood that the city authorities agree to give, and the landholders to accept, an equal area of land directly in rear of the land to be ceded. The United States is expected to pay the expenses of moving back and putting up again on the new sites the several establishments now existing, and of replacing the wharves

along the front as it may be newly established. The aggregate claims for damages on this account will probably amount to \$45,000 or \$50,000.

"It may be proper, after the land on Hutchinson's Island shall have been cut away, to extend the line of bulkheads down to the lower end of Fig Island. The present irregularities of the shore line opposite the city will then disappear, the tidal currents being guided by training walls on both sides, and the maintenance of the increased depth of the harbor rendered less expensive."

The project submitted by the officer of engineers immediately in charge of the improvement at that time, dated August 25, 1887, made among other things the following recommendation (foot p. 11):

"A strip of land should be cut away from the Hutchinson's Island side and the river widened to 600 feet. The damages to private property ought not to exceed \$45,000."

The passages quoted from the report of these officers of engineers were included in and made a part of the annual Report of the Chief of Engineers of the Army for 1888 (Finding IV, foot p. 10).

In the Report of the Chief of Engineers for 1890 the main features of the projects of 1873 and 1882 were restated. Among other features of the project is "the widening of the channel of the river opposite the city to 600 feet," etc. (record, middle p. 12). This widening, as we have seen from the report of 1888, was to be made "by cutting off a portion of Hutchinson's Island," etc. (about one-third down p. 11).

The statement in the report of 1888, that "the aggregate claims for damages on this account will probably amount to \$45,000 or \$50,000," was in 1890 made a formal item in the statement of expenditures as follows: "Possible land damages to Hutchinson's Island, \$45,000" (two-thirds down p. 12).

The total estimate of the improvements under this project was \$3,500,000.

Subsequent to the submission of the estimate to Congress, appropriations were made aggregating the exact amount so estimated. The details thereof are stated at the end of Finding IV (near foot p. 12).

The remaining findings can best be stated in their own language (record, pp. 12-14) :

“ V. The harbor line opposite the city of Savannah was established by the Secretary of War May 4, 1889, in accordance with section 12 of the act of August 11, 1888, (25 Stat. L. 425). It cuts off a strip of land from Hutchinson's Island averaging about 100 feet wide for a distance of about 2,500 feet, and the projects for the improvements of the harbor have contemplated the dredging away of this portion of the island by the United States to give a uniform clear width of 600 feet in the river opposite the city.

“ A contract was made on October 20, 1892, by Captain Carter, and approved by the Chief of Engineers, for cutting off the land outside the harbor line fixed by the order of May 4, 1889, but the work was never done, the appropriation having been used for other purposes, and the project, except as to the future, having been completed.

“ VI. The harbor line aforesaid, shown on Exhibit A, cut off a portion of the claimant's property, about 86 feet in width along its entire front, including 133 linear feet of the ship railway.

“ VII. The unobstructed use of the railway is an essential to the use of any of the shipbuilding and repairing plant. In order to use this railway it was necessary to keep the lower end, which was under water at high tide, free from deposits of mud. For this purpose the claimant had built sheet piling on both sides of it. This was found effectual for the purpose, except that the piling rotted after a number of years' use, and new piling was required.



" VIII. This condition existed in the summer of 1892, and the claimant proceeded to renew his piling, and had more than half completed his work when he was told by Captain Carter, the engineer officer in charge of the improvements in Savannah, to desist, and was notified by him that he must remove everything which was on the outside of the harbor line; and on the 26th or 27th day of August, 1892, he ceased his improvements in consequence of the following letter from the United States district attorney for the southern district of Georgia:

" ' MACON, GA., Aug. 24th, 1892.

" ' H. F. WILLINK, Esq., Savannah, Ga.

" ' SIR: O. M. Carter, Capt. Corps of Engineers, U. S. A., reports that you have had some piles driven in Savannah River outside of the bulkhead line, opposite Whitaker st., Savannah, obstructing navigation, in violation of river and harbor act of Sept. 19, 1890 (26 Statutes L., p. 453, 454). You will at once desist from further obstruction, and remove such piling as Capt. Carter desires removed, *i. e.*, all piling outside of the bulkhead line. Unless this matter is attended to at once I will have to take out proceedings in court to compel compliance and to recover the penalties prescribed by the statute. I will be in Savannah in about two weeks to look after this matter, and I trust that the difficulties will have been adjusted to the satisfaction of Capt. Carter by that time.

Yours truly,

" ' MARION ERWIN,

" ' U. S. Att'y.

" IX. The claimant was also rebuilding his wharf on the west side of the railway, and had it framed and all finished but planking it, but was forbidden by the engineer in charge to cover it with plank and obliged to leave it unfinished.

" X. The result of ceasing work as aforesaid was that the deposits of mud filled up the railway to such an extent that vessels of large draft could not be hauled up on the the railway, and the claimant thereafter was obliged to confine his work to much smaller vessels than he had heretofore been able to repair.

"XI. The chief profit in the claimant's business was in the repair of larger vessels, from which he was thus shut out.

"XII. In order to continue work on the smaller vessels it was necessary to keep up almost continuous dredging at a large expense. Restoring the piling would have obviated the need of dredging.

"XIII. The conditions herein set forth continued until December, 1897. On the 2d day of said month the Secretary of War established a new harbor line, of which notice was given the claimant on the 8th of said month.

"This line, shown on Exhibit A, restored that existing prior to May 4, 1889, and the claimant was thereby restored to possession of his property as it had existed prior to that date.

"XIV. If the claimant is entitled to recover for losses and injuries consequent to his having complied with the demands of the defendants' officers, set forth in Finding VIII, his damages were as follows:

"For the expense of dredging out the entrance, within the boundaries of his own land, of the approach to his marine railroad, \$7,697, such dredging having been rendered necessary in consequence of the order of Captain Carter forbidding him to drive piles and protect the approach from the caving in of the banks and the deposits of the river.

"For his losses in business consequent to the diminished depth of water and his inability to dock large vessels, \$12,500."

### ***River and Harbor Act of 1890.***

The statute referred to in the notice of the United States District Attorney of August 24, 1892 (near foot p. 13; in the opinion of the court, middle p. 16) and commented upon and construed in the opinion (middle p. 17) is the River and Harbor Act of September 19, 1890, 26 Stat. 453, 454. The material provisions of that act are the following:

Sec. 6 makes it unlawful to "cast, throw, empty or

unload " any waste of any kind into any of the navigable waters of the United States, which shall tend to impede or obstruct navigation, or to place any such matter upon the bank, where the same shall be liable to be washed into such navigable waters so as to impede navigation.

Sec. 7 makes it unlawful to build any wharf, pier, bulkhead, jetty or structure of any kind outside of established harbor lines in such manner as to obstruct or impede navigation or commerce.

Sec. 9 makes it unlawful to take possession of or make use of for any exclusive purpose, or to obstruct, or in any other manner impair the usefulness of any sea wall, bulkhead, wharf, pier or other work built by the United States for the improvement of any of its navigable waters.

Sec. 10 provides " that the creation of any obstruction not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited." It provides for fine and imprisonment for a violation of any of these sections.

Sec. 11 makes it the duty of the officers and agents having the supervision of works for improvement of navigable waters, to enforce the provisions of the act by giving information to the District Attorney of the United States.

Sec. 12 provides as follows, p. 455:

" Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulkheads or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall wilfully violate the provisions of this section, or any rule or regulation made

by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court for each offense."

## **II. Assignment of Error.**

The appellant hereby assigns the following error in the proceedings and judgment of said Court of Claims:

That said court held that, on the findings, no cause of action existed in behalf of this appellant against the United States, and dismissed the petition; whereas, said court should have held that the facts found constituted a taking of the property of Henry F. Willink, the original claimant, for public use, and that compensation was due for said property so taken upon an implied contract, as well as under the Fifth Amendment to the Constitution of the United States, and should have given judgment in favor of the appellant for the amount of damages shown by Finding XIV to have been sustained in consequence of such taking, amounting to \$20,197.

## **III. Brief of Argument.**

### ***Grounds of Recovery.***

The grounds upon which the appellant claims a right of recovery are as follows:

1. The Government had the right to take this property for the public use of harbor improvement.

2. This right was exercised by the following acts of governmental authorities:

- (a) The submission to Congress by the officers of the Engineer Corps of the United States Army of a plan which contemplated the taking of this very property and the payment of damages for the same.

(b) The approval of the plan by Congress through the making of appropriations for the same (quoted in Finding III, record, pp. 9, 10; summarized at end of Finding IV, p. 12).

(c) The action of the Secretary of War in the establishment of a harbor line which took in this very property (Finding V, 1st par., record, pp. 12, 13).

(d) The entering into a contract by an engineer officer of the Army, approved by the Chief of Engineers, for cutting off the land outside of the harbor line thus fixed (last par. Finding V, p. 13, and Finding VI, p. 13).

(e) The action of the engineer officer in charge of improvements in ordering Willink to desist from renewing his piling and in ordering him to remove everything belonging to him outside of the harbor line (Finding VIII, p. 13), as well as forbidding him to rebuild his wharf (Finding IX, p. 14).

(f) The action of the United States District Attorney in threatening him with prosecution under the criminal provisions of the River and Harbor Act (quoted, *ante*, pp. 8, 9), unless he "at once desist from further obstruction, and remove such piling as Captain Carter desires removed, *i. e.*, all piling outside the bulkhead line" (Finding VIII, foot p. 13).

3. Willink acquiesced in the taking of his property by such ample authority, both legislative and executive; acted the part of a good citizen in refraining from further acts of ownership thereof or interfering with the projects of improvements; and thus reserved his right to recover compensation.

The opinion of the court below in its first paragraph (record, p. 15) expresses regret at its inability to reach a conclusion favorable to the claimant. It says:

"This is one of those cases where a citizen of the United States has suffered serious loss by ignorance of

Federal law and too great reliance upon the assertions and assurances of officers of the Government. The court nevertheless, has regretfully reached the conclusion that his losses and injuries lie beyond the limits of judicial redress."

This result is reached on grounds thus stated (record, p. 17):

"But it seems to the court only too obvious that the action is not brought for use and occupation, but to recover damages sustained and suffered by reason of the illegal and unjustifiable acts and intimidations of two Government officers. As to the act 19th September, 1890, upon which these officers seem to have based their action, it is one of those statutes which, being against common right, is to be strictly construed and which is to be interpreted and applied in accordance with the constitutional rights of individuals. The pains and penalties prescribed for erecting obstructions must be restricted to obstructions below low water mark—to obstructions erected, not by an owner of private property on his own land, but obstructions erected in public waters on land which, if it belongs to anyone, belongs to the United States. Certain it is that Congress never intended that an executive officer, by drawing a line through a man's farm, should make it unlawful for him to step over it or subject him to fine and imprisonment for driving a pile or building a house on his own land. The harbor line of the Secretary of War, so far as it affected dry land and private ownership, was a line in the air—a line upon paper only—until the Government should acquire a legal right in harmony with the Constitution and in the manner prescribed by law. The claimant's mistake was that he did not appeal from one officer to the Secretary of War and from the other to the Attorney-General."

We think this last statement is in error upon the facts found. The action of the engineer officer at Savannah was not his own action, from which an appeal might

be taken to the Secretary of War. He was simply executing an order given him by the Secretary of War. That order was in terms based upon the authority of an act of Congress. We think also the opinion as above quoted, in limiting the power of the Secretary of War to taking property below low water mark, fails to pay sufficient attention to the recommendation of the Chief of Engineers of the Army contained in his annual report to Congress (record, p. 11), that the work "should now be completed by the cutting away of a strip of land on the Hutchinson Island side," and that a large frontage, containing wharves, "should be removed" (middle p. 11). This project was officially submitted to Congress and appropriations were made by Congress for the specific purpose of carrying it out. It is hardly possible to imagine more complete authority, both legislative and executive, for taking possession of this very land.

It will be seen by the findings, taken in connection with the plat constituting a part thereof and reproduced opposite p. 8 of this record, that the harbor line approved by the Secretary of War May 4, 1889, was not drawn through the water, but cut off a large portion of the land also. These acts constituted an appropriation of the land and the exclusion of the owner from its beneficial use. There could hardly be a clearer case of the taking of private property for public use.

### ***Some Decisions of this Court.***

In *Pumpelly v. Green Bay Company*, 13 Wall. 166, the syllabus thus accurately states the propositions adjudged:

"3. By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be

made for private property taken or sacrificed for public use.

"4. And the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.

"5. It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the Constitution."

*United States v. Great Falls Manufacturing Co.* 112 U. S. 645, was similar to this case in the fact that there were no proceedings to condemn the property for public use. The court said (pp. 656, 657):

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for, the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and electing to regard the action of the government as a taking under its



sovereign right of eminent domain, demand just compensation. *Kohl v. United States*, 91 U. S. 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.' "

This passage meets the view taken in the opinion of the court below (record, p. 17), that the claimant ought to have taken an appeal to some higher authority and that he had no remedy until the Government should formally take steps to acquire a legal title. In this case, as in the *Great Falls* case just quoted, there was legislative authority for taking the property; the Secretary of War exercised that authority; the acts of his subordinate were in pursuance of his directions. This was all that is necessary to make the Government responsible.

In *United States v. Alexander*, 148 U. S. 186, it was held that, when the Government, in the course of extending the Washington aqueduct, sunk a tunnel with the result of drying up a well, the Government was liable for the value of the well, although the tunnel did not go through the claimant's land. There, as here, the argument was that the damage was merely consequential. There was, however, legislative authority for the taking of the land, coupled with a provision giving compensa-

tion to any person "directly injured in any property right" (foot p. 189). Here, as in that case, there was legislative authority for the taking; here, as there, the project contemplated an appropriation of private property and the act of Congress recognized the probability of damage to private property and provided for compensation; here, as there, the injury was suffered by the owner of the land and should be compensated accordingly.

In *United States v. Lynah*, 188 U. S. 445, 465, 466, the court said:

"The government may take real estate for a post office, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others.

"The action which was taken, resulting in the overflow and injury to these plaintiffs, is not to be regarded as the personal act of the officers but as the act of the government. That which the officers did is admitted by the answer to have been done by authority of the government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government. *South Carolina v. Georgia*, 93 U. S. 4, 13; *Wisconsin v. Duluth*, 96 U. S. 379; *United States v. Great Falls Manufacturing Company*, *supra*."

And again (p. 467):

"Thus, beyond the effect of the admission in the answer, and beyond the presumption of knowledge which attends the action of all legislative bodies, it affirmatively appears not only that Congress was making appropria-

tions from year to year for the improvement of the river, but also that it had express notice of damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the width of the waterway; that land would be damaged as the result of those works, and that it authorized the Secretary of War to take proceedings in eminent domain to acquire the land, right of way and material which might be necessary for maintaining, operating or prosecuting works of river improvement, or, if the price could be agreed upon, to purchase the same.

"This brings the case directly within the scope of the decision in *United States v. Great Falls Manufacturing Co.*, *supra*, where, as here, there was no direction to take the particular property, but a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings and sue to recover the value.

"It does not appear that the plaintiffs took any action to stop the work done by the government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. *Roberts v. Northern Pacific Railroad*, 158 U. S. 1, 11; *Northern Pacific Railroad v. Smith*, 171 U. S. 260, and cases cited in the opinion."

This court has recognized as a proper subject for compensation the damage occasioned to a tract of land not taken, resulting from the taking of another tract (*United States v. Welch*, 217 U. S. 333, 338). The court in the opinion by Mr. Justice Holmes said, p. 339:

"The same reasoning that allows a recovery for the taking of land by permanent occupation allows it for a

right of way taken in the same manner, and the value of the easement can not be ascertained without reference to the dominant estate to which it was attached. The argument is only confused by reference to cases like *Gibson v. United States*, 166 U. S. 269, *Harvard College v. Stearns*, 15 Gray, 1, *Smith v. Boston*, 7 Cush. 354, etc., where it was held, although there are decisions the other way, that a landowner can not recover for the obstruction of a public water course, the discontinuance of a public way, or the like. The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private right, and that his damage, though greater in degree than that of the rest of the public, is the same in kind. Here there is no question of the plaintiff's private right."

So too in a case where land was appropriated, allowance was made not only for the land actually taken, but for the depreciation in value of the land not taken (*United States v. Grizzard*, 219 U. S. 180). In the opinion by Mr. Justice Lurton it is said, pp. 184, 185:

"The constitutional limitation upon the power of eminent domain possessed by the United States is that 'private property shall not be taken for public use without just compensation.' The 'just compensation' thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiffs' farm has depreciated the usefulness and value of the remainder the owner is not justly compensated by paying for only that actually appropriated and leaving him uncompensated for the depreciation over benefits to that which remains. In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part of a single parcel upon the remaining interest of the owner, by taking into account both the benefits which accrue and the depreciation which results to the remainder in its use and value."

In *Richards v. Washington Terminal Company*, 233 U. S. 546, the emission of smoke from the mouth of a railroad tunnel was treated as a taking of adjacent property for public use, for which the company was bound by virtue of the Fifth Amendment to the Constitution to make compensation. In the opinion by Mr. Justice Pitney, the court said, p. 557:

"The case shows that Congress has authorized, and in effect commanded, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, with the inevitable concomitants of foul gases and smoke emitted from the engines. No question is made but that it includes the installation and operation of a fanning system for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the necessary consequence, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present. Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him."

In *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, it was held that it is competent for the Secretary of War, acting under authority of an act of Congress, to cause wharves or other structures existing anywhere in navigable waters to be removed without compensation to the owner, even though they may have been lawful when placed there. The difference between that case and the present is in the following particulars:

1. The invasion of the property in this case was of the land,—not merely of the possessory right of a riparian owner in the bed of adjacent navigable water.

2. The right of the present claimant to compensation does not rest entirely upon the constitutional provision of the Fifth Amendment or other general provision of law. It is also based upon the fact that the approved project under which the land and wharves were taken contemplated that they should be paid for, and the estimate of appropriation included \$45,000 for “the damages to private property” and “replacing wharves” and Congress appropriated the sum so asked (see two paragraphs on last half of p. 11 of the record). Hence, the claim rests upon the direct provisions of an act of Congress, in addition to general principles of constitutional law.

### ***Official Acts Constitute a Taking.***

There is no foundation for the view that the acts of the officers of the United States stopped short of a taking of the claimant's property. Everything was done under full sanction of the Secretary of War. He in turn acted under the authority of an act of Congress. Surely, the claimant was not obliged to submit to the indignity of arrest and prosecution, in order to test his rights. On the contrary, he acted as a good citizen, in conforming to the desires of the officers of the Government, who were carrying out the directions of the Secretary of War, and in suffering the damage inflicted upon him, relying upon the courts for redress in awarding him the “just compensation” assured by the Constitution for the taking of his property.

In *Pearsall v. Supervisors*, 74 Mich. 558, 561, the court said:

"The constitutional provision is adopted for the protection of and security to the rights of the individual as against the government, and the term 'taking' should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. In either of these cases it is a taking within the meaning of the provision of the Constitution.

In *Janesville v. Carpenter*, 77 Wis. 288, 301, the court said:

"Any restriction or interruption of the common and necessary use of property that destroys its value or strips it of its attributes, or to say that the owner shall not use his property as he pleases, takes it in violation of the Constitution."

In *Forster v. Scott*, 136 N. Y. 577, the court said:

"Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the Constitution."

In *St. Louis v. Hill*, 116 Mo. 527, 534, the court said:

"The day before the ordinance went into operation, defendant had the unquestionable right to build at will on his lot; the day afterwards, he was as effectually prevented from building on the forty-foot strip, except under peril of punishment, as if the city had built a wall around it, and this too without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

The whole subject is discussed with great fulness in Lewis on Eminent Domain, Secs. 95-100. His conclusions are, that any governmental act which deprives the owner of the beneficial enjoyment of his property, constitutes a taking of the same in a constitutional sense for which the owner must be compensated. The title of Sec. 101 is, "Injury to riparian rights upon public waters is a taking."

Thus, there need not be a forcible ejection of the owner from his land before he can claim damages as for a taking. It is sufficient that he was excluded from it by the direction of officers acting under sufficient authority, legislative and executive.

When the Secretary of War declared the purpose of the executive, the acts of his subordinates were merely administrative in carrying out their superior's order. The Secretary of War expressed his actual control of the claimant's land by making a contract for its removal. The decision to cut away the land was a finality and superseded any necessity of appealing to a tribunal which had already decided his case against him. No rights are lost by failure to perform plainly futile acts.

### ***Damages.***

When this suit was brought, August 3, 1897, the Government was in possession of the land under orders set forth in the findings. There was then no prospect of its restoration. There was at the date of suit, an existing cause of action arising out of the acts of the Secretary of War in the establishment of harbor lines and the further acts of subordinate officers of the Government in taking steps to carry out the directions of the Secretary of War.

A right of action once perfected and accrued and in course of assertion by suit can not be destroyed by



later acts of the defendant not amounting to complete satisfaction of the cause of action thus asserted.

The findings show (Finding XIII, record, p. 14) that the Secretary of War December 2, 1897, established a new harbor line, which restored the one existing prior to May 4, 1889, and the claimant was therefore restored to the possession of his property as it had existed prior to that date. The modified harbor line of 1897 appears on the plat opposite p. 8 of the record and is identical with the one which existed prior to 1889. It is a fair inference from the record that the pendency of this very suit induced the restoration of the old harbor line. This restoration prevented the accrual of further damages after the date of the restoration. It was ineffectual to destroy an existing cause of action.

The original petition (record, pp. 1-3) based upon the supposed permanent appropriation of the whole of the claimant's land, stated the damages at nearly \$200,000. The amended petition, filed December 23, 1898, after the restoration of the original harbor line and therefore based only upon an exclusion of the claimant for about five and one-half years from the use of his own property, reduced the damages claimed (p. 6) to \$40,000.

The court (Finding XIV, p. 14) finds the amount of damages actually sustained to have been \$20,197. For that sum appellant is entitled to a judgment. It is asked that the judgment of the Court of Claims be reversed and the cause remanded with directions to enter judgment for that sum.

GEORGE A. KING,  
WILLIAM B. KING,  
*Attorneys for Appellant.*

U. S. SUPREME COURT  
FILED  
JAN 17 1916  
JAMES D. MATHES  
CLERK

No. 189.

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*In the Supreme Court of the United States*

OCTOBER TERM, 1915

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JENNIE A. WILLIAMS, EXECUTRIX OF HENRY F.  
WILLIAMS, DECEASED, APPELLANT.

THE UNITED STATES.

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APPEAL FROM THE CIRCUIT COURT OF APPEALS.

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FILED FOR THE UNITED STATES.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

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JENNIE A. WILLINK, EXECUTRIX OF Henry F. Willink, deceased, appellant, v. THE UNITED STATES.	}	No. 180.
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*APPEAL FROM THE COURT OF CLAIMS.*

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**BRIEF FOR THE UNITED STATES.**

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## **STATEMENT.**

This is an appeal from a judgment dismissing the petition.

At the time of the acts complained of appellant was the owner of lands containing certain improvements located on Hutchinsons Island in the Savannah River, opposite the City of Savannah, Georgia.

On May 4, 1889, the Secretary of War, in accordance with section 12 of the act of August 11, 1888 (25 Stat. 425), established a harbor line opposite the city of Savannah which extended across the premises of appellant, comprising a width of about one hundred feet along his entire river frontage. This affected

part of appellant's marine railway trackage, his wharf, part of his canal, a boathouse, and several buildings.

By the act of September 19, 1890 (26 Stat., sec. 12, p. 455), section 12 of the river and harbor act of August 11, 1888, *supra*, was amended and reenacted as follows:

Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall willfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, at the discretion of the court, for each offense.

Complying with said act the United States district attorney wrote the following letter to appellant (Rec. 13):

MACON, GA., Aug. 24th, 1892.

H. F. WILLINK, Esq.,

Savannah, Ga.

SIR: O. M. Carter, capt., Corps of Engineers, U. S. A., reports that you have had some piles

driven in Savannah River outside of the bulkhead line, opposite Whitaker st., Savannah, obstructing navigation, in violation of river and harbor act of Sept. 19, 1890 (25 Stat. L. p. 453, 454). You will at once desist from further obstruction and remove such piling as Capt. Carter desires removed, i. e., all piling outside of the bulkhead line. Unless this matter is attended to at once I will have to take out proceedings in court to compel compliance and to recover the penalties prescribed by the statute. I will be in Savannah in about two weeks to look after this matter, and I trust that the difficulties will have been adjusted to the satisfaction of Capt. Carter by that time.

Yours, truly,

MARION ERWIN,  
*U. S. Att'y.*

Appellant was also forbidden (Finding IX, Rec. 14) to continue rebuilding his wharf. A part of the marine railway of necessity was submerged by the river to such a depth that boats could be hauled up on it. To protect the railway from the heavy solution of silt carried by the Savannah River, sheet piling was driven down on both sides. This sheet piling had become rotten, and appellant was renewing it at the time he received the letter from Marion Erwin, the United States Attorney. The cessation of this work caused deposits of mud (Finding X, Rec. 14) to fill up that part of the railway under water, so that "vessels of large draft could not be hauled up on the

railway, and the claimant thereafter was obliged to confine his work to much smaller vessels than he had heretofore been able to repair." In order to be able to use the railway for smaller vessels, appellant was compelled to remove the mud as it accumulated.

The Government never at any time took physical possession of the said premises or improvements thereon. On December 2, 1897, the Secretary of War established a new harbor line which did not include the premises or improvements of appellant.

Appellant insisted in the lower court that the foregoing facts constituted a taking of his property for public use (Rec. 5) and that the Government became thereby, under an implied contract, subject to a claim for its use. But his real position was that of one claiming damages, as the court said, "by reason of the illegal and unjustifiable acts and intimidations of two Government officers" (Rec. 17) In his brief before this court appellant contends for a taking of private property without just compensation under the Fifth Amendment.

The Government's position is that the Secretary of War was delegated by Congress to establish harbor lines upon navigable streams under the said act of August 11, 1888, that his designation of the line upon the Savannah River could not be questioned; that the part of the improvements including the wharf and the section of marine railway affected (Finding VII, Rec. 13) were within high-water lines and were subject to the disposition and control of the

Secretary of War; that the said river and harbor act of September 19, 1890 empowered the Secretary to prevent any work being done beyond the harbor line; that whatever damage, therefore, resulted by reason of the orders of the Secretary or the action of the U. S. district attorney were the incidental consequence of a lawful exercise of governmental power; that there was no appropriation or physical taking of the property in that the Government never took and appellant never gave up actual possession but constantly occupied and used the premises within the limitations heretofore related.

#### **BRIEF OF ARGUMENT.**

First. Congress acted within its constitutional powers in authorizing the Secretary of War to establish the harbor lines in the Savannah River.

Second. The premises directly affected were within high water and harbor lines of a navigable stream and therefore the fifth amendment can not be invoked.

Third. The damages complained of were not the result of direct invasion by the Government, but the incidental consequence of a lawful exercise of governmental power.

Fourth. Appellant's contention being predicated upon tortious acts of Government officials, the Court of Claims was without jurisdiction.

## FIRST.

**CONGRESS ACTED WITHIN ITS CONSTITUTIONAL POWERS IN AUTHORIZING THE SECRETARY OF WAR TO ESTABLISH THE HARBOR LINES IN THE SAVANNAH RIVER.**

The essential question to be decided in this case is whether the establishment on paper of the harbor line by the Secretary of War, under the authority of an act of Congress, and notice to the owner to cease obstructing navigation, constitutes a taking of appellant's property as contemplated by the fifth amendment. One of the preliminary facts to be established is the control of the Savannah River, a navigable stream.

This court said in the case of *Greenleaf Lumber Co. v. Garrison*, Secretary of War (237 U. S. 251-258):

It would seem that the existence of the power of Congress (over a navigable stream) has been withdrawn from the domain of discussion by many authorities, and that little room is left for debate as to the extent of that power.

Congress having this power, delegated its control to the Secretary of War in respect to the designation of a harbor line by section 12 of the act of August 11, 1888 (25 Stat. c. 860, pp. 400-425) as follows:

SEC. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be estab-



lished, beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him.

Pursuant to this act the Secretary of War established a harbor line opposite the city of Savannah on May 4, 1889. Prior to that year the United States had been engaged in making many improvements in the river and harbor, and the engineers of the War Department had made numerous surveys and plans of improvements. (Findings III and IV, Rec. 9-12.) In establishing the harbor line the Secretary of War was simply attempting to carry out previous plans within the power delegated to him by Congress. (*Union Bridge Company v. The United States*, 204 U. S. 364.) As the agent of Congress the Secretary's acts in the premises can not be questioned.

This court has said in the case of *Scranton v. Wheeler* (179 U. S. 141, 162):

But whether navigation upon waters over which Congress may exert its authority requires improvement at all, or improvement in a particular way, are matters wholly within its discretion.

Again, in the case of *United States v. Chandler Dunbar Water Company* (229 U. S. at page 64):

So unfettered is the control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation, is conclusive.

Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control.

On December 2, 1897, the Secretary of War modified the harbor line so as to advance the same toward the river bed and thus release all of the fast land, the wharf, and the marine railroad from the harbor limits. The establishment of the line of 1889 did not exhaust the Secretary's power, but there remained to him authority to change the line when and as often as the demands of navigation in his judgment made it necessary.

*Union Bridge Company v. The United States, supra;*

*Monongahela Bridge Company v. The United States*, 216 U. S. 177, 194;

*Philadelphia Company v. Stimson*, 223 U. S. 605, 638.

## SECOND.

**THE PREMISES DIRECTLY AFFECTED WERE WITHIN HIGH WATER AND HARBOR LINES OF A NAVIGABLE STREAM, AND THEREFORE THE FIFTH AMENDMENT CAN NOT BE INVOKED.**

The harbor line of 1889 was expected to take approximately one hundred feet river front of appellant's lots 4, 5, 6, 7, and 8. The <sup>appellant</sup>~~company~~ contends (brief, p. 9) that compensation was due it under the fifth amendment for this property taken as upon an implied contract.

The fifth amendment can not be invoked where the right of appellant to the use of the river bed was subject to a superior right of the Government, which had been exercised. Here the wharf and part of the marine railway were outside the bulkhead lines of the harbor line of 1889 and in the bed of the stream, and therefore within the confines of a navigable river.

The letter of United States Attorney Erwin (Rec. 13) ordered appellant to remove "such piles as Capt. Carter desires removed, i. e., all piling outside of the bulkhead line." Part of the marine railway that was affected by the harbor line was within the bed of the stream. In order to pull boats up on the marine railway it was necessary for the railway to be submerged. Finding VII (Rec. 13) says:

In order to use this railway it was necessary to keep the lower end, which was under water at high tide, free from deposits of mud.

Under the dominant right of the Government to improve navigation its engineers could require the removal of anything in the bed of the stream which obstructed navigation. (*Union Bridge Co. v. United States, supra*; *United States v. Chandler-Dunbar Water Co., supra*.)

Hence, when appellant constructed the wharf and marine railway within the confines of the stream he did so subject to subsequent action of Congress.

## THIRD.

**THE DAMAGES COMPLAINED OF WERE NOT THE RESULT OF DIRECT INVASION BY THE GOVERNMENT, BUT THE INCIDENTAL CONSEQUENCE OF A LAWFUL EXERCISE OF GOVERNMENTAL POWER.**

The harbor line of March 4, 1889, was only on paper.

In the case of *Prosser v. Northern Pacific Railroad* (152 U. S. 59), Mr. Justice Gray said:

The establishment of general harbor lines, itself, takes or injures no one's property and can not, consistently with the interests of the public, or with the principles of equity, be restrained by injunction.

In the court below Chief Justice Nott said (Rec. 17):

The harbor line of the Secretary of War, so far as it affected dry land and private ownership, was a line in the air—a line upon paper only—until the Government should acquire a legal right in harmony with the Constitution and in the manner prescribed by law.

Appellant was never ousted from his premises. It is true the findings say that he had to cease (Findings X, Rec. 14) repairing the larger vessels and to give up rebuilding his wharf, but he did haul up on the marine railway smaller vessels and repair them and otherwise use his premises, although in a manner as curtailed by the orders of Capt. Carter. Whatever damage, then, resulted to him,

such as the cost of dredging (Finding XIV, Rec. 14) along his marine railroad and a loss of business "consequent to the diminished depth of water and his inability to dock large vessels," occurred from the fact that the improvements affected were within the confines of a navigable stream. Hence the damages complained of were not the result of the direct invasion by the Government of appellant's property, but were the direct consequence of his having been, after the establishment of the harbor line, and notice given, in the position of a trespasser. In other words, the Government officials were exercising a lawful function in denying appellant the use of his wharf and marine railway when located in the bed of a navigable stream. The result of this denial was merely a consequential loss to appellant.

If the Government had constructed a dike as in the case of *Gibson v. United States* (166 U. S. 269) in the river in front of appellant's land and had thus prevented the use of his marine railway and wharf, the injury would have been consequential; or, if the Government had built a revetment in front of his land and in the bed of the stream, as in the case of *United States v. Bedford* (192 U. S. 217) so as to prevent the use of appellant's wharf and his marine railway, the injury would have been consequential.

## FOURTH.

**APPELLANT'S CONTENTION BEING PREDICATED  
UPON TORTIOUS ACTS OF GOVERNMENT OFFI-  
CIALS, THE COURT OF CLAIMS WAS WITHOUT  
JURISDICTION.**

It is not conceded by the Government that the actions of the Government officials in forbidding appellant the use of his wharf and the right to drive piles on either side of the marine railway where the same entered the water and was outside the harbor line of 1889, were tortious; but this is the only interpretation that can be placed upon the contention of appellant as evidenced by his petition.

Chief Justice Nott (Rec. 17) said:

But it seems to the court only too obvious that the action is not brought for use and occupation, but to recover damages sustained and suffered by reason of the illegal and unjustifiable acts and intimidations of two Government officers.

The lower court could not have had jurisdiction over the case in the event that the Government officials had committed torts.

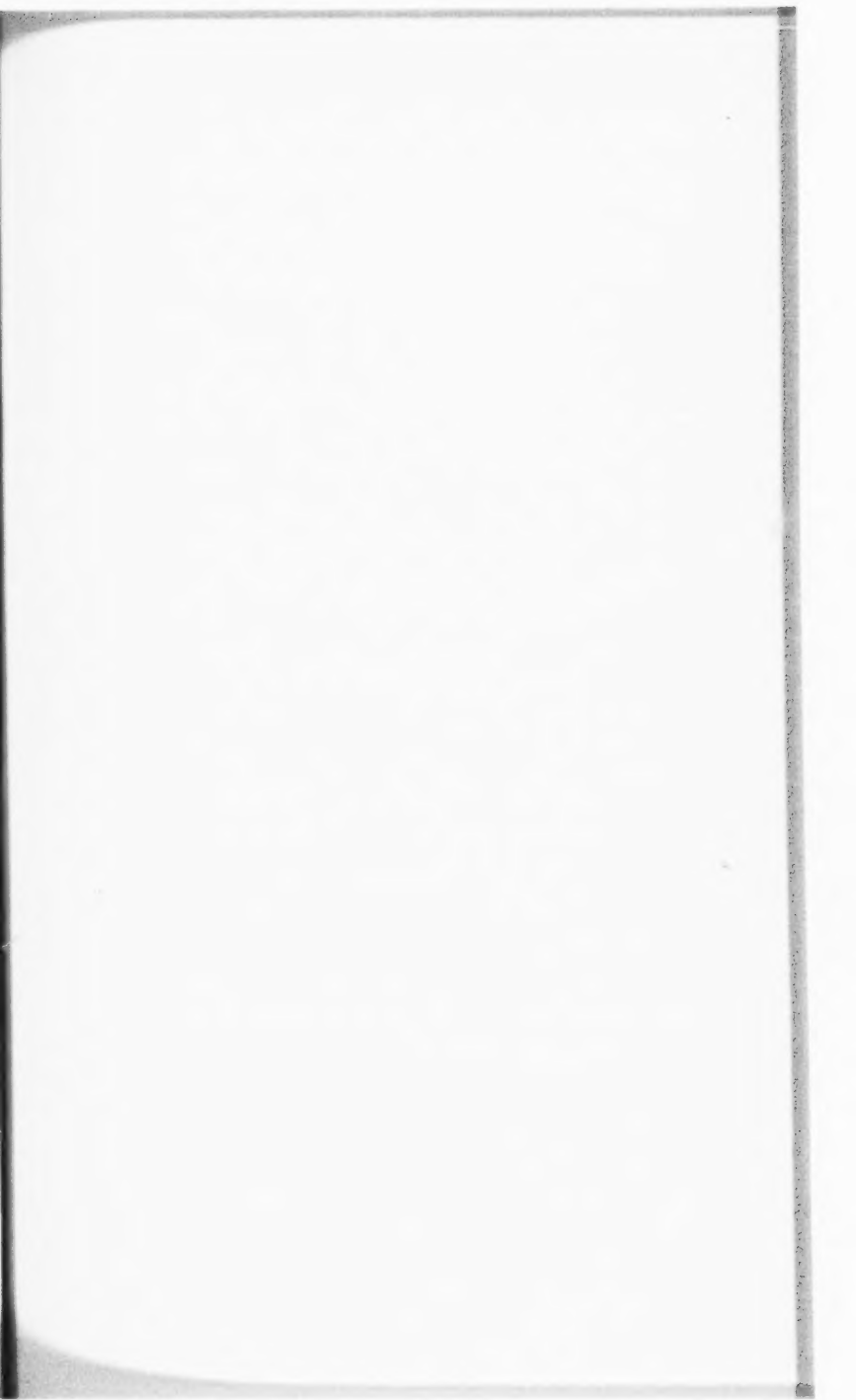
*Langford v. United States*, 101 U. S. 341-346.

*Bigby v. United States*, 188 U. S. 400, 410.

*Hill v. United States*, 149 U. S. 593, 599.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

HUSTON THOMPSON,  
*Assistant Attorney General.*



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Argument for Appellant.

within a harbor line location does not amount to a taking of such land if there was no attempt to perform the contract.

Whatever rights a riparian owner may have in land below mean high-water line of a navigable and tidal river, they are subordinate to the public right of navigation and the power of Congress to employ all appropriate means to keep the river open and navigation unobstructed.

Congress may prevent renewal of existing obstructions below mean high water, if navigation may be injuriously affected thereby, and the owner is not entitled to compensation therefor.

In this case, a riparian owner on the Savannah River was held not to be entitled to recover as upon an implied contract for taking his property by reason of damages alleged to have been sustained by him in consequence of the exercise of the power of Congress over navigable waters.

38 Ct. Cl. 693; 49 Ct. Cl. 701, affirmed.

THE facts, which involve the right of the owner of a wharf in the harbor of the Savannah River to recover from the Government as upon an implied contract for the taking of his property in the improvement of that harbor, are stated in the opinion.

*Mr. George A. King*, with whom *Mr. William B. King* was on the brief, for appellant:

Appellant's right of recovery is based on the following grounds:

The Government had the right to take this property for the public use of harbor improvement.

This right was exercised by the following acts of governmental authorities:

The submission to Congress by the officers of the Engineer Corps of the United States Army of a plan which contemplated the taking of this very property and the payment of damages for the same.

The approval of the plan by Congress through the making of appropriations for the same.

The action of the Secretary of War in the establishment of a harbor line which took in this very property.



The entering into a contract by an engineer officer of the Army, approved by the Chief of Engineers, for cutting off the land outside of the harbor line thus fixed.

The action of the engineer officer in charge of improvements in ordering Willink to desist from renewing his piling and in ordering him to remove everything belonging to him outside of the harbor line.

The action of the United States District Attorney in threatening appellant with prosecution under the criminal provisions of the River and Harbor Act, unless he desisted from further obstruction, and removed such piling as Captain Carter desired removed, *i. e.*, all piling outside the bulkhead line.

Appellant acquiesced in the taking of his property by such ample authority, both legislative and executive; acted the part of a good citizen in refraining from further acts of ownership thereof or interfering with the projects of improvements; and thus reserved his right to recover compensation.

The opinion of the court below in its first paragraph expresses regret at its inability to reach a conclusion favorable to the claimant. *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *United States v. Great Falls Co.*, 112 U. S. 645; *United States v. Lynah*, 188 U. S. 445; *United States v. Welch*, 217 U. S. 333, 338; *United States v. Guzzard*, 219 U. S. 180; *Richards v. Washington Terminal Co.*, 233 U. S. 546.

*Greenleaf v. Garrison*, 237 U. S. 251, distinguished, as the invasion of the property in this case was of the land,—not merely of the possessory right of a riparian owner in the bed of adjacent navigable water.

The right of appellant to compensation does not rest entirely upon the Fifth Amendment or other general provision of law. It is also based upon the fact that the approved project under which the land and wharves were taken contemplated that they should be paid for, and the

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Argument for the United States.

estimate of appropriation included \$45,000 for "the damages to private property" and "replacing wharves" and Congress appropriated the sum so asked. Hence, the claim rests also upon the direct provisions of an act of Congress.

There is no foundation for the view that the acts of the officers of the United States stopped short of a taking of the claimant's property. Everything was done under full sanction of the Secretary of War. He in turn acted under the authority of an act of Congress. Claimant was not obliged to submit to the indignity of arrest and prosecution, in order to test his rights. On the contrary, he acted as a good citizen, in conforming to the desires of the officers of the Government, who were carrying out the directions of the Secretary of War, and in suffering the damage inflicted upon him, relying upon the courts for redress in awarding him the "just compensation" assured by the Constitution for the taking of his property. *Pearshall v. Supervisors*, 74 Michigan, 558; *Janesville v. Carpenter*, 77 Wisconsin, 288, 301; *Forster v. Scott*, 136 N. Y. 577; *St. Louis v. Hill*, 116 Missouri, 527, 534; *Lewis on Eminent Domain*, §§ 95-101.

Mr. Assistant Attorney General Huston Thompson for the United States:

Congress acted within its constitutional powers in authorizing the Secretary of War to establish the harbor lines in the Savannah River. *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 258; § 12, Act of August 11, 1888, 25 Stat. c. 860, 400, 425.

In establishing the harbor line the Secretary of War was simply attempting to carry out previous plans within the power delegated to him by Congress. *Union Bridge Company v. United States*, 204 U. S. 364. As the agent of Congress the Secretary's acts in the premises cannot be questioned. *Scranton v. Wheeler*, 179 U. S. 141, 162; *United States v. Chandler Danbar Co.*, 229 U. S. 64.

The establishment of the line of 1889 did not exhaust the Secretary's power, but there remained to him authority to change the line when and as often as the demands of navigation in his judgment made it necessary. *Union Bridge Co. v. United States*, *supra*; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 191; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 638.

The premises directly affected were within high water and harbor lines of a navigable stream, and therefore the Fifth Amendment cannot be invoked.

The Fifth Amendment cannot be invoked where the right of appellant to the use of the river bed was subject to a superior right of the Government, which had been exercised.

Under the dominant right of the Government to improve navigation its engineers could require the removal of anything in the bed of the stream which obstructed navigation. *Cases supra*.

Hence, when appellant constructed the wharf and marine railway within the confines of the stream he did so subject to subsequent action of Congress.

The damages complained of were not the result of direct invasion by the Government, but the incidental consequence of a lawful exercise of governmental power.

The harbor line of March 4, 1889, was only on paper. *Prosser v. Nor. Pac. R. R.*, 152 U. S. 59.

Appellant was never ousted from his premises. Whatever damage resulted to him, such as cost of dredging along his marine railroad and a loss of business consequent to the diminished depth of water and his inability to dock large vessels, occurred from the fact that the improvements affected were within the confines of a navigable stream. *Gibson v. United States*, 166 U. S. 269; *United States v. Bedford*, 192 U. S. 217.

Appellant's contention being predicated upon tortious acts of government officials, the Court of Claims was with-

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out jurisdiction. *Langford v. United States*, 101 U. S. 341-346; *Bigby v. United States*, 188 U. S. 400, 410; *Hill v. United States*, 149 U. S. 593, 599.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Henry F. Willink sued to recover as upon an implied contract for an alleged taking of his property in the improvement of the harbor in the Savannah River at Savannah, Georgia. A recovery was denied, 38 Ct. Cls. 693; 49 Ct. Cls. 701, and the claimant's executrix prosecutes this appeal.

The material facts disclosed by the findings are these: At Savannah the river is navigable and within the ebb and flow of the tide. Opposite the city is Hutchinson's Island, a strip of which on the side towards the city was owned by the claimant. He there conducted a plant for repairing vessels. Among his facilities used in the business were a marine railway and a wharf. The former extended into the river and was protected by sheet piling "where in the water." A substantial portion of it lay below the mean high-water line, and the wharf seems also to have been below that line, although its location is not precisely stated. In the conduct of the claimant's business the vessels subjected to repair were drawn out of the river and lowered into it by means of the railway, and to prevent its lower end, "which was under water at high tide," from becoming seriously obstructed by deposits of mud the piling was driven on both sides. The piling was effectual for the purpose, but decayed in time and had to be replaced.

Prior to 1887 many improvements had been made in the harbor, and in that year a plan for further and extensive improvements was submitted to Congress, but was not approved. Among other changes this plan contem-

plated a widening of the river by cutting away a portion of Hutchinson's Island including that whereon the claimant's facilities were situate. On May 4, 1889, the harbor line, which theretofore had not reached the island or the claimant's facilities, was reestablished by the Secretary of War, under § 12 of the act of August 11, 1888, c. 860, 25 Stat. 400, 425, in such manner that a part of the claimant's land and all of his facilities were brought within the harbor area. In 1890 another extended project, retaining the earlier proposal to widen the river by cutting away a portion of the island, was submitted to Congress and was approved. The estimated cost of this project was \$3,500,000, which included \$45,000 for "possible land damages" to the island. A part of the larger sum was appropriated each year until the appropriations equalled the full estimate, which was in 1895. The appropriation of July 13, 1892, c. 158, 27 Stat. 88, 92, was accompanied by a provision that "contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate" so much of the estimate as remained unappropriated. A contract was then made for cutting away a portion of the island including that whereon the claimant's facilities were situate, but this work never was done or undertaken, and the appropriations were otherwise exhausted and the project treated as completed.

In the summer of 1892 the condition of the claimant's wharf and piling became such that it was necessary to rebuild the one and to renew the other. While he was so engaged the engineer officer in charge of the harbor improvements requested him to desist and to remove all of his facilities that were within the harbor area as defined by the Secretary of War in 1889. The request was followed by a letter from the United States Attorney for

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that district notifying the claimant that in driving the piling he was obstructing navigation contrary to the act of September 19, 1890, c. 907, 26 Stat. 426, 451-455, and that unless he desisted and "all piling outside of the bulkhead line" was removed he would be prosecuted. Because of this request and notice he ceased work upon the piling and wharf, but did not remove any of his facilities or surrender them or his land to the United States or any of its officers. On the contrary, he continued to operate his plant and use his marine railway and other facilities as best he could. Theretofore he was able to haul up on the railway and repair vessels of considerable draft, and the chief profit in his business came from that work; but thereafter, the renewal of the piling being prevented, deposits of mud filled up the entrance to the railway to such an extent that he was obliged to confine his work to smaller vessels. Even then it was necessary to be almost constantly dredging the entrance. This condition continued until December, 1897, when the Secretary of War reestablished the harbor line as it was prior to May 4, 1889. The expense incurred by the claimant in dredging was \$7,697 and the loss consequent upon his inability to handle the larger vessels was \$12,500.

Upon these facts, as before indicated, the court held that he was not entitled to recover.

We reach the same conclusion, and for the following reasons:

There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in any wise excluded from its use, nor was his possession disturbed. Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use. *Yesler v. Washington Harbor Line Commissioners*, 116 U. S. 646, 656; *Proctor v. Nor. Pac. R. R.*, 152 U. S. 59, 65; *Philadelphia Co. v. Stinson*, 223 U. S.

605, 623. No taking resulted from the request that he remove his facilities, for it was neither acceded to nor enforced. And the contract for cutting away a part of the land was also without effect, because there was no attempt at performance. Thus, at best, the asserted taking rested upon the acts of the engineer officer and the district attorney in preventing the claimant from renewing his piling and rebuilding his wharf. But in this no right of his was infringed. The river being navigable and tidal, whatever rights he possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed. *Gibson v. United States*, 166 U. S. 269, 271; *Scranton v. Wheeler*, 179 U. S. 141, 163; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634, 638; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62; *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 88; *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 263. The piling and wharf were below the mean high-water line, and so, if navigation was likely to be injuriously affected by their presence, Congress could prevent their renewal without entitling him to compensation therefor. See cases *supra*. By the legislation in force at the time, Congress not only authorized the Secretary of War to establish the harbor lines, but made it unlawful to extend any wharf or other works, or to make any deposits, within the harbor area as so defined, except under such regulations as the Secretary might prescribe, and laid upon the district attorney and the officer in charge of the harbor improvements the duty of giving attention to the enforcement of its prohibitive and punitive provisions, Aug. 11, 1888, c. 860, § 12, 25 Stat. 400, 425; Sept. 19, 1890, c. 907, §§ 11-12, 26 Stat. 426, 455. When the claimant attempted to renew the piling and rebuild the wharf they were not only below the mean high-water line but

within the harbor area as defined under this legislation. Consistently with its prohibitions he could not proceed with the work, except under a permissible regulation of the Secretary of War. It is not contended that the work was thus made permissible, and so the conclusion is unavoidable that the claimant was proceeding in violation of the statute and that the engineer officer and the district attorney rightly requested him to desist. Such inconvenience and damage as he sustained resulted not from a taking of his property, but from the lawful exercise of a power to which it had always been subject. *Gibson v. United States*, *supra*, 276; *Bedford v. United States*, 192 U. S. 217, 224.

*Judgment affirmed.*

MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.

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